Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service providers	)	CC Docket No. 95-185
Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers	)	CC Docket No. 94-54

To: The Commission

COMMENTS OF CELLULAR RESELLERS ASSOCIATION, INC.

Lewis J. Paper
David B. Jeppsen
DICKSTEIN, SHAPIRO & MORIN, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700

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Attorneys for Cellular Resellers Association, Inc.

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Summary

The Cellular Resellers Association, Inc. ("CRA") supports the Commission's proposal to establish a federal policy on interconnection between Local Exchange Carriers ("LECs") and Commercial Mobile Radio Service ("CMRS") providers which will guide but not preempt state regulations on interconnection matters.

CRA, the California state association of cellular resellers, has participated in proceedings before the Commission and the California Public Utility Commission ("CPUC") to secure recognition of the cellular resellers' right to interconnect their switches with the facilities of the FCC-licensed cellular carries. The CPUC has issued decisions which further that goal and would be voided if the Commission preempts all state regulation of interconnection matters.

Nothing in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), prior case law, or the Telecommunications Act of 1996 requires preemption of all state regulation on interconnection matters. Indeed, such preemption would be antithetical to the public interest since any interconnection

between the cellular resellers and the cellular carriers would promote rather than impede competition.

The Budget Act only preempted state regulation which established barriers to entry or provided for rate regulation of CRMS services. Nothing in the language or legislative history of the Budget Act indicated, let alone stated, that all state regulation of interconnection matters would or should be preempted. In fact, the Budget Act's revisions to Section 332 of the Communications Act of 1934 expressly provided that states could continue to regulate "other terms and conditions." The legislative history of that phrase indicates that Congress intended to allow states to continue to regulate interconnection matters.

The Commission does have inherent authority to preempt any state regulation which would negate any federal policy. But that power cannot be exercised unless and until the Commission develops a record to demonstrate that state regulation will have an adverse impact on federal policy. There is nothing in the record before the Commission to indicate that state regulation of interconnection matters is having any adverse impact on federal interconnection policies.

Nor is there anything in the Telecommunication Act of 1996 to justify preemption of state regulation on interconnection matters. That new law includes provisions which require all telecommunications carriers to interconnect with other telecommunication carriers. To the extent it has established the foundation for interconnection between cellular resellers and cellular carriers, CPUC actions have furthered -- not impeded -- that goal.

If and when a state regulation does impede federal policies in favor of interconnection and more robust competition, the Commission will have ample opportunity -- and basis -- to adopt a preemption order which responds to the particulars of the situation.

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COMMENTS OF CELLULAR RESELLERS ASSOCIATION, INC.

The Cellular Resellers Association, Inc. ("CRA"), acting pursuant to the Order and Supplemental Notice of Proposed Rulemaking, FCC 96-61 (February 16, 1996) ("Supplemental Notice"), hereby comments on the jurisdictional issues raised in the Commission's Notice of Proposed Rulemaking in the above-referenced dockets. Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, FCC 95-505 (January 11, 1996) ("Notice") at ¶¶ 96-114. More specifically, CRA supports the Notice's proposal to adopt a federal policy to govern interconnection between the Local

Exchange Carriers ("LECs") and Commercial Mobile Radio Service ("CMRS") providers for interstate services and to utilize that policy "as a model for state commissions considering these issues with respect to intrastate services." Notice at ¶ 108.

Interest of CRA

CRA is the California state association of parties authorized by the State of California's Public Utility Commission ("CPUC") to resell cellular service in California. CRA has participated over the years in proceedings before the CPUC as well as this Commission to secure recognition of the cellular resellers' right to install their own switch with the cellular carriers' Mobile Telephone Switching Offices ("MTSOs").

I. Background

As recounted in pleadings and affidavits filed by CRA and two of its members (Cellular Service, Inc. ["CSI"] and ComTech Mobile Telephone Company ["ComTech"]) in General Docket No. 93-252 and CC Docket No. 94-54, the cellular resellers in California have expended hundreds of thousands of dollars to develop a switch that would enable cellular resellers to provide innovative and higher quality services to consumers on a more competitive basis. To that end, the cellular resellers engaged

Ericsson Inc., which manufactures cellular carrier switches, to produce a compatible switch for resellers. A test result was conducted, and the accompanying report was submitted to the Commission in CC Docket No. 94-54.

For its part, the CPUC has been conducting hearings and other public proceedings since the late 1980's to determine whether cellular resellers should be allowed to interconnect their own switches with the cellular carriers' MTSOs. In a number of decisions, the CPUC (1) endorsed the right of the cellular resellers to interconnect a switch with the cellular carriers' MTSOs, (2) directed the cellular resellers and the cellular carriers to exchange information to ensure that any reseller switch would be technically compatible with any MTSO to which it would be connected, and (3) inaugurated proceedings to determine how cellular carrier service offerings should be unbundled to facilitate the installation and billing for any reseller switch. See Mobile Telephone Service and Wireless Communication I.93-12-007 (Decision 95-03-042 March 22, 1995), annexed to the Reply Comments of Cellular Service, Inc. & ComTech Mobile Telephone Company, CC Docket 94-54 (July 14, 1995).

In the meantime, two of CRA's members, CSI and ComTech, have filed numerous pleadings with the Commission requesting

recognition of a cellular reseller's right to interconnect their switches with the cellular carriers' facilities under Section 201(a) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 201(a). Those pleadings include a Petition for Reconsideration with respect to the Commission's Second Report and Order, 9 FCC Rcd 1411 (1994), to the extent that decision failed to recognize the right of a cellular reseller -- as a CMRS provider -- to interconnect its switch with the facilities of the FCC-licensed cellular carriers. CSI and ComTech filed comments in CC Docket No. 94-54 echoing that same view.

The Notice does not purport to address the specific issues raised by CSI and ComTech in General Docket No. 93-252 or CC Docket No. 94-54. Rather, the Notice expressly relates to interconnection policies between LECs and CMRS providers. However, the Notice observed that formulation of policies to govern interconnection between LECs and CMRS providers may later have an impact on the Commission's disposition of the petitions for reconsideration of the Second Report and Order, which include the one filed by CSI and ComTech. Notice at ¶ 18.

The Commission's observation is well-taken. Any decision concerning the preemption of state authority with respect to LEC-CMRS interconnection issues could have a substantial, if not

decisive, impact on CSI and ComTech's Petition for Reconsideration. Since resolution of that petition, in turn, raises issues fundamental to all of CRA's members (as well as cellular resellers in other states), CRA is concerned that resolution of the jurisdictional issues identified in the Notice not undermine the legal principles identified in CSI's and ComTech's Petition for Reconsideration or frustrate achievement of the ultimate goal of the petition to secure recognition of the cellular resellers' right to interconnect their switches with the cellular carriers' MTSOs.

II. No State Preemption Justified

The central issue raised by the Notice is whether state regulation of interconnection involving CMRS providers has already been preempted by the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 312 (1993) (the "Budget Act"), and, if not, whether the Commission should exercise its authority under the Act to preempt any state regulation of such interconnection matters. A third issue raised by the Supplemental Notice is whether anything in the new Telecommunications Act of 1996 requires or authorizes such preemption.

All three issues should be resolved in the negative. To be sure, circumstances could arise where preemption would be justified. But nothing in the present record indicates, let alone demonstrates, that the Commission should now preempt all state regulation of interconnection policies involving CRMS providers. Nor is there anything in the Budget Act, prior case law, or the Telecommunications Act of 1996 which warrants a different result.

The foregoing conclusions have particular importance to cellular resellers in California. It would certainly be ironic if this Commission should -- in the name of competition -- preempt all state interconnection policies and thus void actions by the CPUC to facilitate interconnection and promote competition by cellular resellers.

A. Budget Act Does Not Require Preemption

Contrary to the argument of Cox Enterprises, Inc. and other parties identified in the Notice, the Budget Act did not preempt all state regulation of interconnection matters involving CMRS providers. Notice at ¶¶ 100, 102, 104. Neither the language nor the legislative history of the revised Section

332 states or even suggests that the states lack authority to regulate such interconnection matters.

Section 332(c)(3)(A) provides, in pertinent part, as follows: "Notwithstanding Sections 2(b) and 221(b) [of the Act], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A) (emphasis added). By its express terms, then, the statutory language was directed toward rates charged "by" CMRS providers -- not rates that would be charged by a LEC in providing interconnection. Nothing else in that section indicates that the limited preemption provided by the provision was intended to cover interconnection policies.

The legislative history of the revised Section 332 confirms that Congress did not intend to preempt all state interconnection regulation. It should be remembered that the Commission had established a policy in 1987 -- six (6) years before enactment of the Budget Act -- to govern interconnection between the cellular carriers and the LECs. The Need to Promote Competition and Efficient Use of Spectrum for Radio Common

Carrier Services, 2 FCC Rcd 2910 (1987). In that decision, the Commission preempted state regulation -- but only to the extent that such regulation might impede physical interconnection between the LECs and the cellular carriers. The Commission explicitly reserved to states the right to otherwise regulate the provision of intrastate service. 2 FCC Rcd at 2912-13.

Although that policy -- and its implementation -- were a matter of public record, there is nothing in the Budget Act itself or in the legislative history which reflects a congressional intent to extend the preemption to all state regulation of interconnection matters. Rather, the legislative history -- as well as other provisions of the Budget Act -- make it clear that Congress was focused only on state regulation of rates charged by cellular carriers and other CMRS providers to subscribers.

Thus, Section 332(c)(3)(B) established a limited grandfather clause for states which had any regulation in effect on June 1, 1993 "concerning the rates for any commercial mobile service offered in such state on such date. . ." 47 U.S.C. § 332(c)(3)(B). And Section 332(c)(3)(A) provides that all states could petition the Commission at any time for authority to "regulate the rates for any commercial mobile service" if the

state could demonstrate that "(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state." 47 U.S.C. § 332(c)(3)(A). In other words, a state could secure authority from the Commission to regulate CMRS rates if the state could show (1) that there was insufficient competition to ensure reasonable and nondiscriminatory rates for "subscribers" or (2) that a substantial portion of the public was relying on CMRS service to meet its needs for local exchange service.

The Conference Report confirms that the statutory language was directed at CMRS services to the public at large and not to state regulation of interconnection matters:

> [T]he Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the Conferees that States should be permitted to regulate these competitive services

> simply because they employ radio as a transmission means.

H.R. Conference Report No. 213, 103d Cong., 1st Sess. 493 (1993). Nowhere did the Conference Report make reference to the Commission's interconnection policies or the need to establish any uniform policy to govern every aspect of interstate and intrastate service for interconnection between the LECs and a CMRS provider or between two CMRS providers.

The absence of any such discussion in the legislative history is particularly noteworthy since Congress recognized "the right to interconnect [as] an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network." H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 261 (1993) ("House Report"). To serve that latter goal, Congress merely required -- in Section 332(c)(1)(B) -- that the Commission "respond" to a request for interconnection, but the statutory language explained that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act." 47 U.S.C. § 332(c)(1)(B).

Other legislative history similarly demonstrates that Congress did not intend to supersede all state regulation of

interconnection matters. The preemption provided in Section 332(c)(3)(A) preserved to the states the right to regulate "the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). The statute itself does not define "other terms and conditions," but the House Report -- which first proposed the language -- states as follows:

> By "terms and conditions," the Committee [on Energy and Commerce] intends to include such matters as customer billing information and practices and billing dispute and other consumer protection matters; facility siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a State's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

House Report at 261 (emphasis added).

Issues of bundling and provision of services on a wholesale basis are the very kinds of terms and conditions which the CPUC is addressing in developing a framework to govern installation of cellular resellers' switches to the cellular carriers' MTSOs. Since the CPUC had made public its initial decisions to allow interconnection of resellers' switches prior to enactment of the Budget Act, the reference to bundling and

wholesale rates cannot be deemed to be accidental.[1/] In short, no reasonable conclusion can be drawn that the Budget Act, by its express terms, preempted state regulation of interconnection matters.

There is nothing in various memoranda submitted to the Commission to show otherwise. See Notice at ¶¶ 100 n.129 & 104. Although parties representing the cellular carriers and prospective providers of Personal Communications Services believe that the Budget Act did preempt all state regulation of interconnection matters, they are ultimately reduced to relying on inferences rather than the express terms of the statutory language or the legislative history. Definitive declarations of Congressional intent should not rest on a veneer so thin.

[1/] It would indeed be ironic if the Commission should now determine that the phrase "other terms and conditions" does not include reference to interconnection matters. CRA filed comments in support of the State of California's petition to retain regulatory authority over rates for cellular service and other CMRS services. In denying that petition, the Commission nowhere stated that its decision precluded any action by the State of California with respect to interconnection policies (although CRA and ComTech had already filed numerous pleadings advising the Commission of the CPUC's decisions on interconnection matters). State of California, 10 FCC Rcd 7486 (1995). CRA subsequently filed a Petition for Reconsideration asking the Commission to provide further clarification of the phrase "other terms and conditions" as used in Section 332. The Commission denied that petition as well. State of California, 11 FCC Rcd 796 (1995).

B. No Justification for Exemption Under Case Law

Independent of Section 332, the Commission has authority to preempt state regulation "so long as it can show that the state regulation negates a valid federal policy." National Association of Regulatory Commissioners v. FCC, 880 F.2d 422, 431 (D.C. Cir. 1989). As explained in the memorandum submitted by Willkie Farr & Gallagher, Commission preemption is appropriate "when the states' exercise of authority unavoidably would negate the legitimate exercise of the Commission's own interstate authority." Willkie Farr & Gallagher, "The Bases of Interconnection Compensation Preemption" (October 30, 1995) at 10 (emphasis added).

The authorities cited in the Willkie Farr & Gallagher memorandum, as well as the other authorities cited in the Notice, confirm that Commission preemption of state regulation can be justified if -- but only if -- the Commission can demonstrate that state regulation is inconsistent with an established federal policy, that the state regulation cannot co-exist with the federal policy, and that the continued application of state regulation would undermine the federal policy. E.g. Public Service Commission of Maryland v. FCC, 909 F.2d 1510, 1515-17 (D.C. Cir. 1990) (doubtful that Commission preemption could be

based "simply on the grounds that [state regulation] is economically irrational or even that it imposes too great an economic burden on carriers," but preemption could be justified to prevent "a direct effort by a state to impose costs on interstate service that the FCC believes are unwarranted"); People of the State of California v. FCC, 905 F.2d 1217, 1242-44 (9th Cir. 1990) (Commission "may not justify a preemption order merely by showing that some of the preemptive state regulation would, if not preempted, frustrate FCC regulatory goals" but must instead demonstrate "that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals"); Public Utility of Texas v. FCC, 886 F.2d 1325, 1332-1335 (D.C. Cir. 1989) (Commission satisfied its burden to demonstrate that the Texas Public Utility Commission's decision would deny a party the right to provide interstate telephone service); Illinois Bell Telephone Company v. FCC, 883 F.2d 104, 116 (D.C. Cir. 1989) ("Commission legitimately determined that inconsistent state regulation of joint CPE/service marketing would negate the valid federal goals of the order under review"); National Association of Regulatory Utility Commissioners v. FCC, supra, 880 F.2d at 429-31 (Commission had failed to carry its burden of preempting all state regulation of

inside wiring since many states, like the Commission, had already unbundled inside wiring from basic transmission services); New York Telephone Company v. FCC, 631 F.2d 1059, 1066-67 (2d Cir. 1980) (Commission satisfied its burden in preempting state charges on interstate service since Commission had already established regulations governing such charges); North Carolina Utility Commission v. FCC, 537 F.2d 787, 793 (4th Cir.), cert. denied, 429 U.S. 1027 (1976) (preemption of state regulation permissible only if regulation "encroaches substantially upon the Commission's authority").

There is nothing in the Notice or the record before the Commission to show that any state policy on interconnection is interfering with CMRS interconnection rights.[2/] Quite the contrary. Commission preemption of all state regulation of interconnection policies would, at least in the case of California, impede rather than advance federal policy. As explained above, CPUC decisions are designed to promote competition by expanding the right of certain CMRS providers (including cellular resellers) to interconnect their facilities with other carriers. If and when the record establishes that

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2/ Such a record would presumably be easy to develop if state regulation were negating federal policy since the cellular carriers have had years of experience with the LECs and accompanying state regulation.

state policies and regulations are interfering with the rights of CMRS providers to interconnect, the Commission can and presumably will take appropriate action.

C. No Preemption Justified By Telecommunications Act Of 1996

The Telecommunications Act of 1996 devotes considerable attention to the obligations of LECs to facilitate interconnection but little attention to CMRS matters. Indeed, to the extent it has any relevance to the jurisdictional issues raised in the Notice, the Act supports the Notice's proposal to refrain from preemption of all state regulation on interconnection matters.

Section 101 of the Telecommunications Act of 1996 adds a new Section 251(a) to the Act which states that "[e]ach telecommunications carrier has the duty -- (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunication carriers. . . ." The term "telecommunications carrier" is defined as "any provider of telecommunications services," which, in turn, is defined as "the offering of telecommunications for a fee directly to the public. . . ." Telecommunications Act of 1996, P.L. 104-104, Section 3(49) & (50). Cellular resellers, like other CMRS providers, must be

deemed to be telecommunications carriers and thus entitled to interconnect with the facilities of the FCC-licensed cellular carriers, who are also telecommunications carriers. Therefore, the CPUC's decisions to authorize interconnection between the cellular resellers and the cellular carriers would further that federal policy -- not negate it.

It is also noteworthy that a new Section 251(i) states that "[n]othing in the Section shall be construed to limit or otherwise affect the Commission's authority under Section 201." The Conference Report explained that subsection was designed to make clear "the conferees' intent that the provisions of the new Section 251 are in addition to, and in no way limit or affect, the Commission's existing authority regarding interconnection under Section 201 of the Communications Act." H.R. Report 104-458, 104th Cong., 2d Sess. 123 (1996). Thus, Section 251(i) confirms that the Telecommunications Act of 1996 cannot be invoked to restrict the interconnection rights of cellular resellers.

The new Section 253(e) added by the Telecommunications Act of 1996 further provides that "[n]othing in this section shall affect the application of Section 332(c)(3) to commercial mobile service providers." That subsection thus preserves the

prior amendments to Section 332 which preempted state regulation of barriers to entry and rates charged by CMRS providers. Nowhere, however, did the Telecommunications Act of 1996 purport to expand the preemption authority previously established in the revised Section 332. Congress' failure to provide further specificity is of special significance since the Commission's proceedings in CC Docket No. 94-54 were well underway by time of enactment.

III. Federal Policy Should Guide State Regulations

The foregoing analysis demonstrates that there is no basis at this juncture for the Commission to proceed except as proposed in the Notice. It may be, as in the case of the CPUC, that state regulation will further the Commission's interconnection policies and promote the congressional goal "of a seamless national network." House Report at 261. Until the facts show otherwise, the Commission would hardly be in a position to satisfy its burden that state regulation will negate any federal promotion of that seamless network of CMRS providers.

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CONCLUSION

WHEREFORE, in view of the foregoing, it is respectfully requested that, as proposed in the Notice, the Commission adopt a federal interconnection policy to be used as a guide by the states.

Respectfully submitted,

DICKSTEIN, SHAPIRO & MORIN, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700

By: _____
Lewis J. Paper
David B. Jeppsen

Attorneys for Cellular Resellers Association, Inc.